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Attorney for Plaintiff
WAYNE BERRY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;) **Civ. No. CV03 00385 SOM-LEK**
Plaintiff,) **(Copyright)**
vs.)
HAWAIIAN EXPRESS SERVICE,) **DECLARATION OF TIMOTHY J.**
INC., a California corporation; et al.) **HOGAN FILED IN SUPPORT OF**
Defendants.) **PLAINTIFF WAYNE BERRY'S**
) **MEMORANDUM IN REGARD TO**
) **HAWAIIAN EXPRESS SERVICE,**
) **INC. RELATED CLAIMS;**
) **EXHIBITS A TO E**
)
)
)

**DECLARATION OF TIMOTHY J. HOGAN FILED IN
SUPPORT OF PLAINTIFF WAYNE BERRY'S MEMORANDUM IN
REGARD TO HAWAIIAN EXPRESS SERVICE, INC. RELATED CLAIMS**

I, TIMOTHY J. HOGAN, am an attorney licensed to practice before all the courts of Hawaii and I make this declaration under penalty of perjury. All the

statements herein are true and correct to the best of my knowledge, information and belief. If called upon to testify regarding the matters contained herein, I am competent and willing to do so. This declaration is filed in support of Mr. Berry's oppositions to the Motions in Limine filed by the PCT.

1. Attached hereto as Exhibit "A" is a true and correct copy of transcript of proceeding dated March 3, 2003 that addressed the closing of Plaintiff's case in chief and the motions for judgment as a matter of law that were raised by Fleming in the previous case Wayne Berry v. Fleming Companies, Inc. et al, CV 01-00446 SPK-LEK.

2. Attached hereto as Exhibit "B" is a true and correct copy of transcript of proceedings that addressed the settling of instructions in the previous case Wayne Berry v. Fleming Companies, Inc. et al, CV 01-00446 SPK-LEK dated March 5, 2003.

3. I have no recollection of the events that Mr. Smith recounted in the Hearing on January 20, 2006 regarding Judge King throwing out Mr. Berry's claims of vicarious infringement or changing the verdict form to take out the claim. Attached hereto as Exhibit "C" is a true and correct copy of Plaintiff Wayne Berry's First Proposed Special Verdict Form that makes no reference to vicarious infringement.

4. I have searched electronic copies of the transcripts and the jury instructions submitted by Mr. Berry and other than a redacted set of instructions that shows I did not intend to submit the instruction, the word vicarious was not mentioned in the pre-trial filings in the weeks before the commencement of the trial in the previous case to the best of my knowledge. I did state in my opening that the use by HEX constituted infringement.

5. Attached hereto as Exhibit "D" is a true and correct copy of transcript of proceedings in the previous case Wayne Berry v. Fleming Companies, Inc. et al, CV 01-00446 SPK-LEK dated February 24, 2003 that includes an excerpt from my opening statement.

6. Attached hereto as Exhibit "E" is a true and correct copy of transcript of proceedings in the previous case Wayne Berry v. Fleming Companies, Inc. et al, CV 01-00446 SPK-LEK dated March 4, 2003, regarding the testimony of Teresa Noa the Fleming logistics supervisor and Fleming's direct infringement derived from distribution to HEX.

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief upon the review of the records that the time would permit.

DATED: Honolulu, Hawaii, January 23, 2006.

/s/ Timothy J. Hogan
TIMOTHY J. HOGAN